

*United States Court of Appeals  
for the Second Circuit*



**BRIEF FOR  
APPELLANT**



C.A. No. T-3061

74-1061

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,  
*Plaintiff*

vs.

DANIEL VALERIANO, et al.,  
*Defendants.*

Magistrates Docket No. 2  
Case Nos. 59, 63, 65, and 68

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT  
A MOTION FOR RETURN OF PROPERTY  
/SUPPRESSION OF EVIDENCE

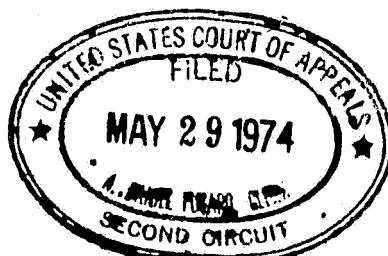
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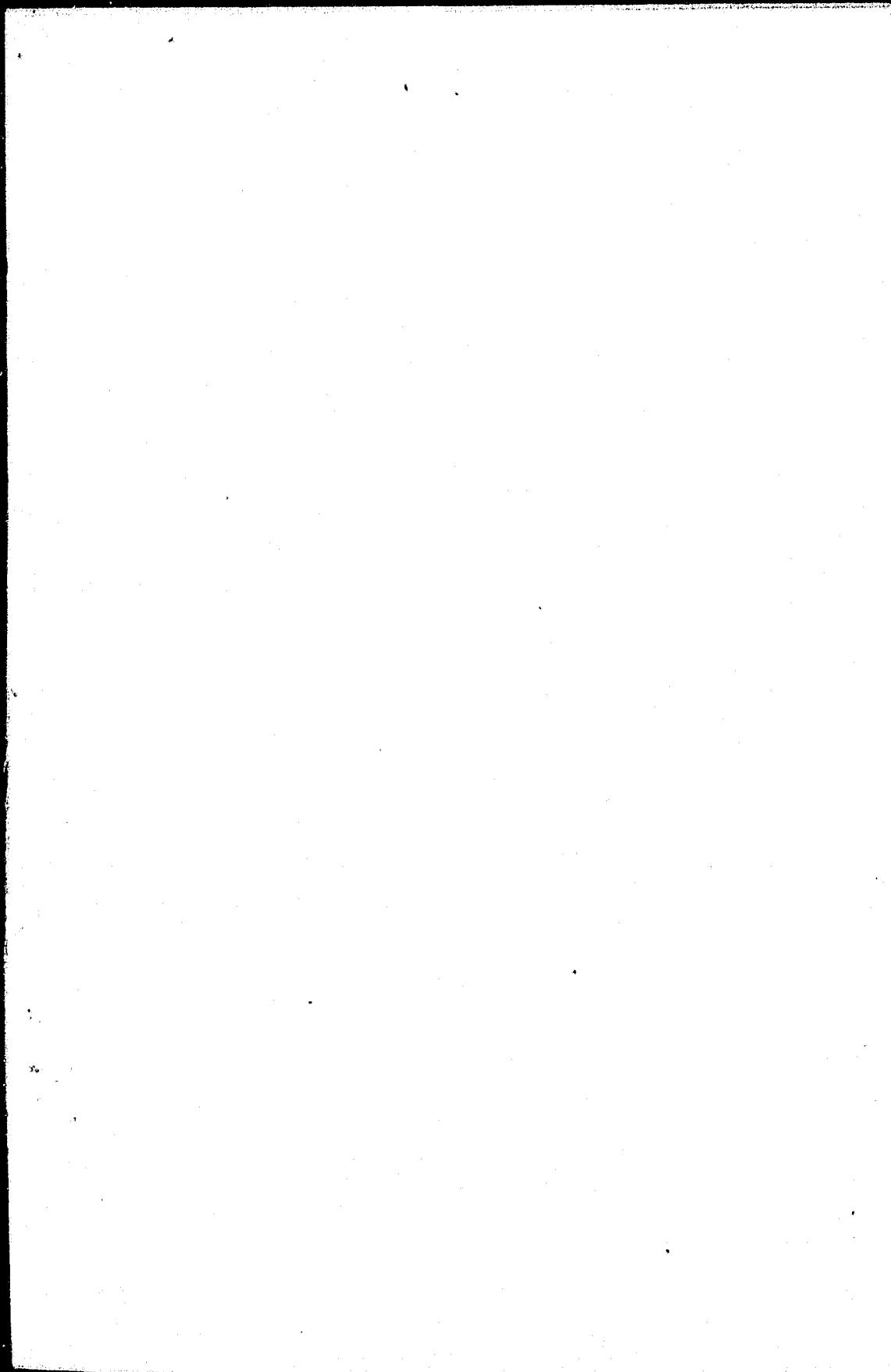
APPELLANT'S BRIEF

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## TABLE OF CONTENTS

- I. Table of Contents
- II. Table of Cases, Statutes  
and Authorities
- III. Statement of the Issues
- IV. Statement of the Case
  - 1. Preliminary Statement
  - 2. Statement of Facts
- V. Argument Summary
  - 1. Due Process  
Deprivation
  - 2. Defective Notice  
of Tap
  - 3. Absent Notice of  
Warrant Hearing
- VI. Conclusion and Relief Sought

TABLE OF CASES,

I. Table of Cases

	Brief pag
<u>Alderman v. United States</u> , 394 U.S. 165 (1969).	13,
<u>Berger v. New York</u> , 388 U.S. 41 (1967).	17,
<u>Bivens v. Six Unknown Agents</u> , 403 U.S. 388 (1971).	20,
<u>Cogen v. United States</u> , 278 U.S. 221 (1929).	23,
<u>DiBella v. United States</u> , 369 U.S. 121 (1972).	10,23
<u>Evans v. United States</u> 242 F2d 534 (6th, 1956).	17,
<u>Gelbard v. United States</u> , 408 U.S. 41 (1972).	17,27
<u>Grosso v. United States</u> , 390 U.S. 62 (1968).	22-23
<u>Hill v. Philpott</u> , 445 F. 2d 144 (7th, 1971).	22,
<u>Perlman v. United States</u> , 247 U.S. 7 (1918).	10,12
<u>Schmerber v. California</u> , 384 U.S. 757 (1966).	22,
<u>Silverthorne Lumber v. United States</u> , 251 U.S. 385 (1927.)	29-30,
<u>Stuart v. United States</u> , 416 F.2d.459 (5th, 1969).	22,

Brief page

United States v. Bennett, 409 F.2d, 888 22,  
(2nd, 1971).

United States v. Cantor, 328 F. Supp. 561 18,  
(W.D.Pa., 1971).

United States v. Calandra, -U.S.- (1974). 10, 28-30,  
42 USLW 4104

United States v. Dionisio, 410 U.S. 29,  
(1973).

United States v. Eastman, 465 F.2d. 1057 8, 17, 20,  
(3rd, 1972). 25-26,

United States v. Gross, 137 F. Supp 244 17,  
(S.D.N.Y., 1956).

United States v. La Gorga, 137 F. Supp. 17, 18,  
244 (W.D.Pa., 1971).

United States v. Rosenwasser, 145 F2d. 11, 23,  
1015 (9th, 1945), 156 ALR 1200.

## 2.

Table of Statutes

Omnibus Crime Control and Safe Streets Act of 1968 (18 USC 2510 <u>et seq</u> ):	
Section 2515	Quoted at 13,20,27,28
Section 2518 (5)	Quoted at 14,20,25
2518 (8) (d)	1,8, Quoted at 14,19,20,26
2518 (9)	2,9, Quoted at 15,17,21,26,31
2518 (10) (a)	Quoted at 16,17,19,20,27,28
2520	26

## 3.

Table of Authorities

<u>U.S. Code, Congressional and Administrative News</u> (1968) Senate Report on Omnibus Crime Control Act	.....1F
--	---------

Federal Rules of Criminal Procedure (West, 1973)	.....11,24
--	------------

### III. STATEMENT OF THE ISSUES.

This appeal presents three issues, respectfully urging remand to the District Court for a more complete hearing. Those issues are:

1. Is an unarrested citizen, who was deprived of substantial property by a Federal Government seizure pursuant to warrant and who was otherwise prejudiced thereby, denied fundamental due process when refused a full hearing before indictment on the probable cause for the search, where the issue is the Government's compliance with the statute authorizing interception of telephonic communications, [18 U.S.C. 2510 *et seq.*], the interceptions comprised the substance of the affidavit alleging probable cause for the search, and the notice of wiretap shows unlawful delay on its face?

2. Is an unarrested citizen, who was deprived of substantial property by a Federal Government seizure pursuant to a tainted warrant and who was otherwise prejudiced thereby, entitled to suppression of any and all evidence seized, and to return of the same property before indictment, when the search and seizure warrants were supported by affidavits relying on an "authorized" wiretap which in turn violated the controlling statute [18 U.S.C. 2518(8)(d)], in that the subject of the Wiretap Order was neither served with notice within the statutory time allowed nor was the subject informed of any lawful extensions of that notice period?

3. Is an unarrested citizen, who was deprived of substantial property by a Federal Government seizure pursuant to a tainted warrant and who was otherwise prejudiced thereby, entitled to the suppression of any and all evidence seized and to the return of the same property

before indictment, when the search and seizure warrants were supported by affidavits relying on information gathered during an "authorized" wiretap which in turn violated the controlling statute [18 U.S.C. 2518 (9)] in that the subject of the Wiretap Order was not served with notice 10 days before the first admission of wiretap evidence against him in legal proceedings, in this case a Magistrate's hearing to authorize search warrants?

## IV. STATEMENT OF THE CASE.

1. Preliminary Statement

The Appellant, Daniel Valeriano, was subjected to a search and seizure by agents of the Federal Bureau of Investigation, pursuant to 4 warrants, approved by a federal magistrate in New Haven, Connecticut, on July 16, 1973. Failing in a Motion for Return of Property, he appeals.

Not yet indicted, Daniel Valeriano, on September 17, 1973 moved for Return of Property, pursuant to Federal Rule of Criminal Procedure 41(e), as amended. A hearing on the Motion occurred on October 1, 1973. Judge Jon. O. Newman, of the United States District Court, District of Connecticut, denied the Motion on November 20, 1973 (Magistrates Docket No. 2, Cases No. 59, 53, 56 and 68). Notice of appeal was filed.

Search subject Valeriano contended that the search warrants authorizing the seizure of his property were tainted by illegally seized evidence, acquired under an improperly authorized wiretap. Movant argued to the District Court that the wiretap authorization was fatally flawed as procedurally inadequate; hence the affidavits supporting the searches and seizures were improper. As the affidavit substantiated probable cause to search (1) from communications seized during the interception and (2) also verified informer reliability, the quality of the wiretap affects the propriety of the search and the exclusion (and return) of the subject's seized property.

Movant Valeriano claimed the authorization of the wiretap to be improper, and hence illegal, in that he received inadequate and improper notice of the tap and extensions of the notice requirement; that he received no

notice of the intercepted communications use against him at the hearing on the search warrants itself failed to allege probable cause.

Judge Newman denied the motion; treating it as an evidence suppression issue alone. The Court especially failed to speak to the question of taking without due process, or to the Government's continued deprivation of Movant's property without indictment or Grand Jury inquiry. Further the issues of wiretap authorization were summarily dismissed with full hearing.

The District Court erroneously assumed that no present prejudice resulted from the motion's denial, as Movant would have a later opportunity to reinquire at a post-indictment proceeding.

## 2. Statement of the Facts

A broad investigation of interstate violations of federal gambling laws was focused on Movant Daniel Valeriano and four others, when a wiretap authorization was signed by Judge Thomas Murphy, United States District Court, District of Connecticut, in early January, 1973. The tap was authorized from January 15, to January 30, 1973. According to allegations sworn to by F.B.I. Special Agent Raymond Connolly, in an affidavit before Federal Magistrate Latimer on July 16, 1973, the wiretap resulted in incriminating evidence against the Movant.

Movant received a letter of notice of authorization by mail from Assistant United States Attorney Coffey, on July 10, 1973. Less than a week later, federal search warrants were issued in New Haven, Connecticut, to search and seize gambling paraphenalia from two premises, a 1973 Cadillac and the person of Daniel Valeriano.

Those four warrants were executed in the afternoon of the same day, July 16, 1973.

The team of F.B.I. agents, executing the warrants, entered on to the property at 11 Simsbury Street, Waterbury, Connecticut and there found the Movant and his Cadillac. Finding gambling records in the kitchen, a full scale search and seizure ensued. The Government seized the Cadillac, substantial cash from the Movant's person, a great variety of personal records, several bankbooks and a quantity of securities; none of which has yet been returned.

On September 17, 1973, Search subject Valeriano Moved for Return of Property. He had not yet been indicted or had a Grand Jury been called in connection with either the wiretap or the search warrants and seizures. That was still true when the Motion was heard, and when it was denied on November 20, 1973. It is still true at the time of this writing, April, 1974.

At the hearing, Agent Connolly testified to the fact of the wiretaps and the unproven extensions of the notice requirement periods.

Agent William Zimmerman testified that the inventory provided to Movant was lacking any specification of the proper orders for extension of period of notice. In a long colloquy between Judge Newman, Attorney Coffey and Defense Attorney Lasala, it became clear that there might be a need to unseal Judge Murphy's order authorizing the January wiretap. There was no rebuttal evidence to Movant's demonstration that the notice inventory did not articulate the extensions of time to notice the wiretap, and so appeared to present on its face a *prima facie* case of a violation of the statutory wiretap authorization procedure.

There was no claim that any attempt was made to notify the Movant of the admission of evidence gathered from the wiretap, before Magistrate Lattimer at the hearing on the authorization of the 4 July search warrants.

## V. THE ARGUMENT.

1. Summary of the Three Issues.

The first issue presented by this appeal is the question whether:

an unarrested citizen who was deprived of substantial property by a Federal Government seizure pursuant to warrant and who otherwise prejudiced thereby, is denied fundamental due process when refused a full hearing before indictment on the probable cause for the search, where the issue is the Government's compliance with the statute authorizing interception of telephonic communications, [18 U.S.C. 2510 et seq.] the interceptions comprised the substance of the affidavit alleging probable cause for the search, and the notice of wiretap shows unlawful delay on its face.

Movant has been denied due process. He is entitled to move for Return of Property quite apart from the institution of a criminal proceeding against him. In fact, certain rights to the possession of material evidence are not available to the Government until the subject has been charged. Such independent motions are appealable.

Rights to a full opportunity to be heard are especially denied when substantial deprivation of property and other prejudice results from a search and seizure. Movant has been foreclosed, pending criminal charges, from engaging in an in-depth inspection of the Wiretap Order underlying the probable cause for the search warrants.

In the instant case, the District Court failed to respond to the deprivation of property component of the pre-indictment motion, and treated it--incorrectly--solely as a motion to suppress evidence.

The second issue presented by this appeal is the question whether:

an unarrested citizen, who was deprived of substantial property by a Federal Government seizure pursuant to a tainted warrant and who was otherwise prejudiced thereby, is entitled to suppression of any and all evidence seized, and to return of the same property before indictment, when the search and seizure warrants were supported by affidavits relying on an "authorized" wiretap which in turn violated the controlling statute [18 U.S.C. 2518(8)(d)], in that the subject of the Wiretap Order was neither served with notice within the statutory time allowed nor was the subject informed of any lawful extensions of that notice period.

Suppression and return of property is required by both statute and federal rule, where Movant was prejudiced by improper notice of wiretap and thereafter unable to test the validity of probable cause for a subsequent search. The legal rule is clear from United States v. Eastman, 465 F.2d. 1057 (1972), and related cases, that suppression must result when a subject has been prejudiced by a failure of notice under the applicable statute.

Besides the deprivation of property, Movant's prejudice is clear in his subjection to infringements of his privacy, of Government intrusions into his personal effects and his home, seizures of his conversations, as well as his unwilling self-incrimination in matters of taxes and tax records.

There is further, uncertainty as to the state of the law on the status of this Motion ruling on future post-indictment Supression Motions. As it is not at all clear that this denial does not foreclose Movant's reopening the Supression

question after indictment, the ruling on such limited scope is especially prejudicial at this juncture.

The third issue presented by this appeal is the question whether:

an unarrested citizen, who was deprived of substantial property by a Federal Government seizure pursuant to a tainted warrant and otherwise prejudiced thereby, is entitled to the suppression of any and all evidence seized and to the return of the same before indictment, when the search and seizure warrants were supported by affidavits relying on information gathered during an "authorized" wiretap which in turn violated the controlling statute [18 U.S.C. 2518(9)] in that the subject of the Wiretap Order was not served with notice 10 days before the first admission of wiretap evidence against him in legal proceedings, in this case a Magistrate's hearing to authorize search warrants.

Where the Movant is foreclosed from an opportunity for full exploration of his rights and statutory protections by the narrow scope of pre-indictment evidentiary hearings, additional protections of Fourth Amendment rights are found at "proceedings deserving notice" under statute [18 U.S.C. 2518(9)], if Congressional intent to protect privacy is to be honored. This interpretation is consistent with the reading of Congressional intent as to notice in the leading cases, and the recent expansive interpretation of "proceeding" as to other subsections of the statute.

Like unindicted Grand Jurors, Movant should be able to invoke the suppression hearing as to suspect wiretap orders in non-adversary proceedings.

Though the recent decision in United States v. Calandra, U.S. (1974), limits exclusion before Grand Juries, it does so for reasons of expeditious inquiry not relevant to the warrant hearing under discussion in this case. Like petitioners in other cases arising out of suppression motions help prior to the calling of Grand Jury, the exclusionary rule applies.

As pre-indictment evidentiary motions are limited in scope, they do not replace the noticed proceedings in the statute. Failing that notice, suppression and return result.

2. As to the First Issue, Appellant's Motion sought Return of valuable Property, being Held without Due Process Hearing on the Taking. As No Indictment has been Entered, the Independent Motion is Appealable for Error, as Having Ignored the Essential Deprivation.

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A. Appellant is entitled to Move for Return of Property under the Criminal proceeding, and to appeal.

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Leading cases, such as Perlman v. United States, 247 U.S. 7, (1918) [and others noted at Section V.3.C. infra.], and DiBella v. United States, 369 U.S. 121 (1972), note the viability of motions to return property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure [or the earlier equivalent]. Such motions, when no criminal proceeding has been instituted, are functionally "final" and appealable, apart from any related criminal case, despite even Movant's arrest, if made pre-indictment. See annotation to United States v. Rossenwasser, 145 F.2d. 1015 (9th, 1945), 156 ALR 1200.

The Motion provides for a test of a possible

illegal search and seizure. And it is the primary device for restitution of property in nascent criminal matters. However, the procedural rule requires that the property be first found suppressible and only then may it be returned. However, forthcoming constructions of the new Rule 41(e) may vary, as the old language of "otherwise subject to lawful detention notwithstanding the grant of the motion" has been struck. For 1972 Amendments to the Rules, see Federal Rules of Criminal Procedure (West, 1973) at 63.

B. Appellant seeks restitution of substantial property taken without sufficient due process; yet the Court failed to respond at all to the property claim.

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Movant has been without the substantial value of his seized property for over nine months, since the seizure in July, 1973. He estimates its worth at over \$30,000.00. His Motion to Return was directed at testing that taking as insufficient under the due process clause of the Fifth Amendment to the Constitution of the United States.

Though that is part of the object of the motion under Rule 41(e), the District Court denied the motion without so much as a sentence to the issue of the taking.

Apparently the Court simply presumed the Motion to be a part of an ongoing criminal proceeding, and as such a preliminary matter of exclusion of evidence. Judge Newman characterizes Movant as "Defendant" in his Ruling, although Movant has yet to be charged or even arrested.

The basic motion for return is grounded in the equity powers of the Court. Movant deserves to

have his claim considered on grounds apart from evidence suppression procedure, if the motion is truly to have force as an independent action existing apart from criminal proceedings. Perlman v. United States, supra.

Movant has been sorely prejudiced not only by deprivation of property but by his inability to assert his rights against abusive and illegal searches, unlawful seizure of his private conversations by wiretap, and to avoid self-incrimination before the Internal Revenue Service. See Section V.3.B. of this Brief, infra.

As yet, no use has been made of the property by the government in evidentiary or investigatory manner, except as against defendant through tax process and harassment by deprivation. No grounds of cause for the taking other than a lawful warrant were ever alleged by the Government.

Does full test of the supporting allegations of probable cause have to wait until post-indictment as indicated by the District Court?

Where Movant, who is aggrieved, is unable to obtain redress until the Government in its discretion chooses (if ever), to use evidence or fruits thereof against him then that along constitutes significant taking without due process.

Such restricted opportunity to be heard constitutes a denial of due process.

3. As to the Second Issue, Suppression, and Return of Property, is Required by Statute and Federal Rule, where Appellant was Prejudiced by Improper Notice of Wiretap, and Thereafter Subject to a Search and Seizure of Untestable Validity.

A. Failure of the Mandatory Statutory Notice of Wiretap Results in Exclusion of Wiretap Evidence where Prejudice has Resulted to Wiretap Subject.

The Federal Omnibus Crime Control and Safe Streets Act (18 United States Code Sections 2510-2520) provides statutory control over wiretaps and other electronic surveillance that might result in "intercepted communications" likely to be used in federal law enforcement, in possible derogation of individual privacy and the Fourth Amendment. See especially Section 801 of the Public Law; also Alderman v. United States, 394 U.S. 165 (1969).

In particular the procedural statute reads, in those parts pertinent here:

18 U.S.C. 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political sub-division thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. 2418(5):

"No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be

granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of Extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon such attainment of the authorized objective, or in any event in thirty days."

18 U.S.C. 2518(8)(d):

"Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application;
2. the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

3. the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

18 U.S.C. 2518(9):

"The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information."

18 U.S.C. 2518(10) (a):

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress

the contents of any intercepted wire or oral communication, or evidence derived therefrom on the grounds that--

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization of approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communications, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

The leading case on the interpretation of the notice requirement is United States v. Eastman, 465 F.2d. 1057 (3rd, 1972), which holds that where the notice requirement is intentionally waived by the responsible judge, the prejudice to the subject of

the wiretap is sufficient to require exclusion of all such evidence from any trial (there a prosecution for the unlawful manufacture of drugs). Eastman notes United States v. Gross, 137 F. Supp. 244, 248 (S.D.N.Y., 1956), on procedural protections:

"A failure to make a correct return or to file the inventory, noted below, however, should result in the suppression only where prejudice is shown." Evans v. United States, 242 F.2d. 534 (6th, 1956), cert. den. 353 U.S. 976 (1957).

Eastman notes the incorporation of the exclusionary rule in the Act through Section 2515, as settled in Gelbard v. United States, 408 U.S. 41 (1972). The Eastman court notes the Congressional intent, where the Senate Report on the Act discusses exclusion as "imposing an evidentiary sanction to compel compliance with the other prohibitions of the chapter... The provision must be read in light of Section 2518(10)(a), discussed below, which defines the class entitled to make [Section 2518(9)] motions to suppress." 1968 U.S. Code Congressional and Administrative News, 2184-5.

Where there is no prejudice from delayed notice, federal courts have been generous. Six months delay was allowed in United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa, 1971). However, respecting the concerns about wiretap notice articulated by Justice Clark for the Majority, in Berger v. New York, 388 U.S. 41, 60 (1967):

"Finally, the [unconstitutional] statute's procedure, because its success depends on secrecy, has no requirements for notice

as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping with its inherent dangers, than that required when conventional procedures of search and seizure are utilized."

the LaGorga court decided that:

"The purpose of requiring notice is obviously to prevent government abuse and continuing secrecy in the use of wiretaps. In this case the Court approved the extensions requested upon valid grounds and in due course the inventories were served. The purposes of the requirement are met." LaGorga at 194.

A similar result was approved for a delay of a few days without requisite extension where no prejudice was found, United States v. Cantor, 328 F. Supp. 561 (W.D. Pa. 1971).

But the developed rule is clear: there must be no prejudice to those "aggrieved" by the wiretap, the notice must ultimately be served, and except for very short delay incidents, extensions must meet the appropriate requirements. In the instance case, however, the Movant was sorely prejudiced by the delay of notice, and extensions did not meet the requirements.

B. Movant was Prejudiced by Belated Notice of Wiretap, as it Denied Him Opportunity to Timely Test the Constitutional and Statutory Validity of the Wiretap Infringement of his Privacy. And It Rendered Him Subject to an

Arguably Illegal Search and Seizure.  
He has been Deprived or Substantial  
Property without Due Process and it has  
Subsequently Led to Self-incriminations  
in a Matter Unarticulated by the Seizure  
Warrant, to Which He may Now have  
Insufficient Grounds to Object.

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Movant received notice of wiretap authorizations against him and others just seven (7) days before he was subjected to a search and seizure, pursuant to a warrant relying in extensive part on the aforesaid wiretap. In such a short time, Movant was unable to avail himself of counsel and to file his motions to test the wiretap as provided under Section 2518(10)(a) supra.

As the inventory on its face notes the termination on of Authorization the 30th of January, 1973, the notice provided to the Appellant, totally silent as it is about any extensions, itself is a *prima facie* case of procedurally illegal wiretap authorization under Section 2518(8)(d). At a minimum, such a presentation requires a showing of record or other proof of the *ex parte* hearings for good cause to extend the period of notice. Statute, Id.

Admissions by the Government in open court articulate Movant's right to unseal the wiretap orders and test the record and affidavits thereon. Notwithstanding, failing to find prejudice, the District Court denied "Defendant's" Motion without inspection of the wiretap order.

In matters involving individual civil rights, the federal courts especially are under obligation to pursue any theory whereby a party's legal opportunity for remedy and redress may be preserved, Bivens v. Six Unknown Agents, 403 U.S. 388 (where Fourth Amendment Rights were the focal issue).

By interpreting the Movant's motion as a simple evidentiary suppression and then denying it, the court has failed to provide a timely forum for Movant's rights, and has rendered him exposed to uncertain indictment, unable to test or prevent the abuse of either his private communications or his personal property.

Judge Newman's characterization of the Movant as "Defendant" in his ruling, shows his presumption that this motion was merely part of a criminal process and not subject to full scope. This despite the fact that Movant has still to be charged or arrested!

Primarily, the Movant stands denied a timely opportunity to invoke statutory protection of his Fourth Amendment rights to be free of unreasonable search and seizure of his conversations, as guaranteed him by the Congress under 18 U.S.C.2515 and 2518(5). His Motion denied, Movant is now subject to the abuse discussed in Eastman, 465, F.2d. at 1063, note 13, where the court worries:

"If the last sentence of 18 U.S.C. 2518 (8) (d) be employed for continuous postponements for good cause by a judge of competent jurisdictions, a situation could ensue whereby even if issued on an invalid warrant could never be suppressed or its validity questioned and any issue presented by 18 U.S.C. 2518 (10) (a) (i) could not be adjudicated, for the defendant could obtain no knowledge as to the illegality of the interpretation on which he could base an objection. [Emphasis added]"

But the Court notes the statutory solution, Id.:

"It follows therefore that 18 U.S.C. 2518 (9) is intended to provide the defendant whose

telephone has been subject to wiretap an opportunity to test the validity of the wiretapping authorization."

But the inescapable point is, according to the ruling of the District Court, that the Movant has both to wait to be indicted, and also to be noticed that the Assistant United States Attorney intends to use wiretap related evidence before his protections against possibly illegal wiretap can come into play pursuant to Section 2518(9). Jeopardy in the form of exposure to prosecution, in order to provoke lawful protection from a deprivation of a Constitutionally granted right is high prejudice of the first water.

Second, because Movant was thus not able to properly test the wiretap order, he was also unable to demonstrate the infirmities which might very well affect the search and seizure warrant's supporting affidavit. Had Movant been timely able to challenge the wiretap order, he very well might have shown it improper. The suppression of the Wiretap evidence would necessarily result in the evisceration of the probable cause shown by the affidavit for the search warrant. That might have succeeded in preventing the outrageous and unreasonable intrusion by federal agents into the home and onto the person of Movant, in direct violation of the Fourth Amendment.

Thirdly, as a result, Movant was subsequently subject to searches and seizures of his person and residence and automobile, resulting in the taking of in excess of \$30,000.00 worth of Appellant's property, which has now been held for over nine months without justification. The property has been seized without due process. Movant's Motion to Return Property was ignored, the return now untestable except after indictment by a Grand Jury not yet convened.

In the fourth instance, Movant has been subject to further prejudice in the form of actions by the Internal Revenue Service based on the records and fungibles seized in the questionable raid of July 17, 1973. While this Circuit has rejected the rule of Hill v. Philpott, 445 F.2d. 144 (7th, 1971), cert. den., 404 U.S. 991 (1972) [Fifth Amendment "testimonial" exclusions permitted as to use of personal records, notwithstanding proper Fourth Amendment Warrants authorizing seizure], in United States v. Bennett, 409 F.2d. 888, 896-897, cert. den. sub. Nom. Thomas v. United States, 416 F.2d. 459 (5th, 1969) on the tax-payers' right to assert Fifth Amendment privileges, Movant deserves opportunity to test the warrant. Stuart v. United States, 416 F.2d. 459 (5th, 1969).

Certainly such Fifth Amendment rights control pending resolution of the propriety of a warranted seizure. Unlike petitioners in Bennet or Philpott, Movant has not even been able to finish a determination of the lawfulness of the search that has so prejudiced him.

The principle that the Fifth Amendment protects only from "compelled testimony," articulated Schmerber v. California, 384 U.S. 757 (1966), applies here. By the appearance of force and proper warrants, Movant was compelled to provide to the Government, records and fungible property which he would not have otherwise turned over. That property has been used as testimonial evidence against him by the Internal Revenue Service, despite its likely immunity to subpoena [Grosso v. United States, 390 U.S. 62 (1968)]. It has provided ground for *ex parte* takings contrary to his civil and (unindicted) criminal interests.

Appellant has been highly prejudiced in four separate categories as a result of delayed notice

and refusal to allow inspection of what may prove to be an improper wiretap.

C. Further, under the Amended Rule 41 of the Federal Rules of Criminal Procedure, Movant is Prejudiced by the Possible Impact of this Suppression Ruling as res judicata.

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It is uncertain that a combined Rule 41 (e) Motion, "For Return of Property and Suppression of Evidence" is not to be treated post-indictment as res judicata on the question of suppression. Though the general rule is that motions for return of property are treated as independent when no criminal process is pending, Cogen v. United States, 278 U.S. 221 (1929); Perlman v. United States, 247 U.S. 7 (1918); United States v. Rossenwasser, 145 F. ed. 1015 (9th, 1945), 156 ALR 1200, those same cases also seem to represent the rule that it constitutes an unappealable motion, merely a first step in the criminal process when the motion "lacks independence." The test for that separateness is not always that clear.

DiBella v. United States, 369 U.S. 121 (1972) raises the questions in its most recent context, where a border search resulted in a stay by Justice Douglas. Particularly problematic is his consideration of a special statutory grant of appealability. Reasoning by indirection, the suggestion is that without that special statutory grant, the Motion for Return of Property entered there under Criminal Procedure Rule 41, would be treated as subordinate to the potential criminal prosecution and, at least unappealable in an interlocutory manner, if not res judicata, and thus only ex post facto appealable.

Looking at the 1972 Amendments to the Federal Criminal Rule suggest a shift in judicial policy toward the absorption of the pre-indictment motion into the criminal process: (1) by generalizing the Rule 41 (e) motion for return of property from five enumerated grounds to a single one of "Entitlement to property illegally seized", (2) by striking the grant of authority to retain property if "otherwise subject to lawful detention", and (3) by the direction to treat a Motion for Return of Property as a Suppression Motion if made or brought to hearing [despite earlier filing] after the bringing of an indictment. See Federal Rules of Criminal Procedure, (West, 1973) at 63.

The same uncertainty seemed to be bothering the Government during the Hearing on the Motion: "If the Court upholds the search of the wiretap [order] today, the Government would not have to be concerned with the same attack if an indictment is returned." Attorney Coffey, Transcript at 35

Where there exists the chance that the Court's ruling below will, on appeal, be found to be the final determination on the quality of the wiretap, (or soundness of the search warrant affidavit), the Movant suffers great prejudice from the limited scope of the hearing. Insofar as the Ruling below was inadequate to fully permit Movant to inspect the wiretap order, a finding of foreclosure as to the exclusion issue, would itself prevent the Movant from ever testing his statutory right to Fourth Amendment protections that would constitute further prejudice beyond all the present prejudices (Section B supra.).

As discussed above, the statutory protection against improper wiretaps includes strict notice requirements, to be strictly construed as in any

statute in derogation of individual civil rights. Those notice requirement delays might well be thought to need specification on the record, and perhaps on the inventory as well, as do the extensions of the tap authorization proper under Section 2518(5), though hearings are ex parte.

Where there is prejudice to the subject of the Wiretap, deviations from the notice requirements cannot be tolerated, and suppression must result, United States v. Eastman, supra. Thus, the property must be returned to the Movant, as originally moved, under Rule 41 (e).

4. As to the Third Issue, when Movant is Denied Proper Opportunity to be Heard in Opposition to the Use of Wiretap Evidence by the Narrow Scope of Pre-indictment Evidence Motions, He is Provided Further Opportunity in Hearings Deserving Notice, if Congressional Intent is to be Respected. Without such a Construction, He is Unable to Further Assert His Fourth Amendment Rights. Absent such Notice, Suppression and Return of Property Result.

A. Appellant was Entitled to Pre-Proceeding Notice by Statute, which He did Not Receive.

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The leading interpretation of the notice provisions of Title III of the Omnibus Crime Control Bill (U.S.C. 2510 et. seq.), reads the two procedural sections on notice jointly. United States v. Eastman, 465 F.2d. 1057, 1063 n. 13 (3rd, 1972). As quoted herein, supra, crt 20-21, the "pre-proceeding notice" provision (of 10 days), Section 2518(9), protects wiretap subjects from abuse of successive notice extension, as Section 2518(8)(d) could permit the hiding of government surveillance, possible abuse, and derogation of rights of citizens merely "under suspicion." The legislature intent had to be directed

at exactly that possibility, otherwise the statute provides no basis to invoke the statutory remedies. See discussion in Eastman, Id.

That is exactly what happened in his case. Successive delays of statute-mandated notice of the wiretap succeeded in providing the Movant with virtually no effective notice of the possible derrogation of his Fourth Amendment rights by way of the wiretap. A week later, a separate and at least equally egregious intrusion on Fourth Amendment privacy occurred with a four-warrant search and seizure, leaving the Movant \$30,000.00 poorer.

Tardy as it was, the original notice did not provide enough time independent of its subsequent use in the search warrant application to test its validity under the civil damages action provided by 18 U.S.C. 2520; nor did it occur in time sufficient to provide even the essential collateral, and constitutionally essential, pre-proceeding notice function discussed in Eastman, supra. at 20-21.

Without opportunity to raise the question at the hearing on the warrant, the Movant apparently has to wait until indictment in order to enter a full hearing to assert and protect his Fourth Amendment rights.

It amounts on its face, and in practice (as so interpreted), to an unconstitutional condition of jeopardy precedent to assertion of a constitutional right, which is uniformly condemned. And the Congressional intent to provide a forum for testing the wiretap order for statutory compliance must include all practicables "proceeding" in order to avoid such a result.

B. Statutory Language as to "proceeding" is Not Limited to Adversary Proceedings, According to the Statute and the Cases.

The question of statutory meaning of "proceeding" as raised by Movant's claim to pre-proceeding notice encompassing the hearing on the warrants to search and seize his property and person, has been resolved by the Supreme Court of the United States. The majority in Gelbard v. United States, 408 U.S. 41 (1972), interpreted the word "proceeding" as used in 18 U.S.C. 2515, read in terms of the whole wiretap statute. It was there found applicable to the grand jury proceeding, where a witness was facing contempt charges for refusal to answer questions; assertedly his testimony would be inadmissible as fruits of illegal wiretap, which the statute and the Gelbard court permitted him to test, prior to testimony.

This full hearing was permitted despite the omission of "grand jury" in the enumeration of Section 2518(10), of "proceedings subject to the exclusion remedy." The Court found that proceeding necessarily implied to serve congressional purposes in the statute as a whole.

Despite the broad rules of the Grand Jury, such easy admissibility in the investigation was not intended to have anything "whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt." The key was the condition of individual jeopardy defensible by the exclusionary rights of Section 2515. Such is exactly the case of appellant facing the search warrant, quite possibly without lawful probable cause.

As the Gelbard majority put it:

"Grand Jury witnesses do not normally discover whether they may refuse to answer questions by filing motions to suppress their potential testimony. The usual procedure is upon the Government's motion, to have a court order for non-compliance.... The asserted omission of grand jury proceedings from Section 2518(10)(a) may well reflect congressional acceptance of that procedure as adequate in those cases. Consequently, we cannot suppose that Congress, by providing procedures for suppression motions, intended to deprive grand jury witnesses of the Section 2515 defense that would otherwise be available to them."

Subject to at least four distinct infringements of personal liberty and property rights (as discussed in Section V. 3. B supra.), Movant is obviously jeopardized even more directly than the grand juror in Gelbard. No more than the Supreme Court would take away protections given in Section 2518(10), neither should District Court forbid Movant's opportunity to receive notice of the only hearing where he can directly and fully test the protection of his constitutional rights.

As noted in section V. 3. C, supra. a Motion for Return of Property hearing pre-indictment may never reach the opportunity to test the wiretap order, as occurred to Movant here.

The new decision in United States v. Calandra, U.S. (1974), 42 USLW 4104, is not opposed to this interpretation of "proceeding." Without ruling against the statutory interpretation of Gelbard, supra., Calandra rather notes a policy limitation on wiretap challenges before the grand jury.

In the balance between individual rights (Calandra was not indicted, nor was he under citation for contempt), the Court found favor for the expeditious progress of the grand jury's investigation; it held, that "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties" Id. at 4107.

Unanswered is the question posed by the case here appealed. Movant here is under distinct prejudice, and is not seeking to impede the grand jury or any similar proceeding. He rather seeks to find a timely forum to explore the protection of his right to be free of unreasonable [wiretap] searches.

Explicitly because he is seeking to avoid "frustrating [the grand jury and] the public interest in fair and expeditious administration of the criminal law," United States v. Dionisio, 410 U.S. 1, 17 (1973), Movant seeks to test his privacy rights now, before any indictment investigation by the grand jury even begins.

To deny immediate opportunity to test Appellant's Fourth Amendment rights via a pre-proceeding notice so as to provide a forum of appropriate scope for tests of those statutory and constitutional rights is error, apart from any ruling on the merits. It further entangles the courts in illegal behaviors condemned decades ago in Silverthorne Lumber v. United States, 251 U.S. 385 (1920), where a grand jury was forbidden to indict from evidence unlawfully seized.

Like the petitioner in Silverthorne, the Movant here is asking for a hearing well before

the convention of the grand jury, completely obviating the worry or policy against impediment. To refuse Appellant's due process rights on the basis of Calandra would be to misread its concerns altogether.

C. A Pre-indictment Motion does Not Reach the Issue of Wiretap Order Validity, and so Cannot Replace Appellant's Right to a Full Hearing in Test of the Wiretap Guaranteed by Statute.

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The ruling of the District Court, the leading cases and the apparent judicial policy reflected in the 1972 amendments to the Federal Rules of Criminal Procedure [as outlined in section V.B.C. supra.], suggest that a Motion for Return of Property is inadequate to protect Appellant's rights. Heard pre-indictment, its limited scope may not reach the merits of a validity test of a wiretap order allegedly authorized in accordance with the statute. If it is so held, Movant must be otherwise heard before indictment.

The District Court treated it as renewable, with fuller scope sufficient to explore fully the statutory exclusions, as a post-indictment, pre-trial motion to suppress. If that limitation on the pre-indictment motion is good law then Movant is altogether denied his rights under Section 2518 (9) unless permitted to raise question at pre-indictment proceedings, at the hearing on the warrants to search, in order to there test the offensive wiretap.

He should not have to subject himself to criminal sanctions in order to be able to assert his rights under the statute.

Movant must have a fair and unfettered opportunity to exercise his rights to inspect the wiretap, and test compliance with the lawful proceeding as guaranteed under the statute. Without proper notice of the wiretap, or of the pre-indictment hearing on the search warrants, Movant is without sufficient forum to develop his inquiry save that he subjects himself to criminal sanctions.

Those sanctions have not yet been forthcoming. Meanwhile, despite prejudice from the seizure, Movant is without further remedy to protect his rights to privacy and to secure the timely return of his personal property. Section 2518(9) must, in the instant case, apply to the warrant hearing or Movant is without proper redress for substantial injury and prejudice.

## VI. CONCLUSION AND REMEDY SOUGHT.

The Movant appealing here has been denied full opportunity to benefit from the protections provided by his constitutional rights, as he has been unable to properly inspect a questionable wiretap order. He has been denied timely notice of that wiretap and has been refused notice and standing before the only pre-indictment proceeding at which he might have tested that wiretap. He has further suffered extensive prejudice from seizures based virtually exclusively on the wiretap.

Denied due process to test such a taking, exclusion and return of his property must result, failing a full rehearing.

For the errors aforesaid, Movant respectfully requests this Court to reverse the denial of "Defendant's" Motion for Return of Property and remand it to the District Court for full hearing on the statutory compliance of the wiretap order.

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This is to certify that copy of the foregoing has been furnished to the United State Attorney.

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